

**United States Department of Labor
Employees' Compensation Appeals Board**

SHEYLA M. OGILVIE, Appellant

and

**DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Hilliard, FL, Employer**

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**Docket No. 04-1316
Issued: October 19, 2004**

Appearances:
Sheyla M. Ogilvie, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On April 19, 2004 appellant filed a timely appeal of two decisions of the Office of Workers' Compensation Programs: a January 8, 2004 decision which rejected her claim for an emotional condition commencing November 6, 2003; and a March 22, 2004 decision which rejected her request for reconsideration on its merits under 5 U.S.C. § 8128(a). Pursuant to the provisions of 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits and the nonmerits of this case.

ISSUES

The issues are: (1) whether appellant has established that she sustained an emotional condition on November 6, 2003, causally related to compensable factors of her federal

employment; and (2) whether the Office properly refused to reopen appellant's case for further review on its merits under Title 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 2, 2003 appellant, then a 43-year-old air traffic safety specialist, filed a notice of injury alleging that an operational error occurred on November 6, 2003 which shook her up. A witness, Reggie L. Chester, a coworker, indicated that he was working in a nearby sector at the time of appellant's operational error and she was clearly very upset during the deviation and even more so after being relieved from the position.

By letter dated December 3, 2003, the Office advised appellant that the evidence received was insufficient to establish her claim, and it requested that she submit a physician's opinion containing a diagnosis and explaining how her injury resulted in the condition diagnosed. The Office also requested that appellant provide further factual information to establish what happened.

On December 3, 2003 the Office received a two-paragraph addendum to appellant's claim which noted that, on November 6, 2003, she issued a clearance to an aircraft and a different aircraft read back the descent clearance and she did not hear the read back. The different aircraft then descended on top of another aircraft and got too close. Appellant claimed that she kept seeing the descending aircraft over and over again, and that she could not get it out of her head, but this time the airplanes collided and people died. She claimed that she was angered at the pilot who took the wrong clearance and that she was angry at herself for not listening better. Appellant claimed that she was scared that she might miss another read back error and that this time people would die. She claimed that she could not sleep at night because the incident kept running through her head, and that made her tired the next business day and she found it hard to focus on her job. Appellant stated that she felt vulnerable, tired and out of control.

On December 15, 2003 the Office received a form dated December 9, 2003 in which appellant responded to Office inquiries. Appellant stated that she told her supervisor about the operational error immediately following the incident on November 6, 2003, that she was the radar controller at sector 66 on November 6, 2003 when she had an operational error and two planes got too close and that the operational error shook her up. She noted that the incident was recorded on tape and that she thought she should get recertified afterwards and get back in the saddle, but that after a few days she was not getting any sleep and was having terrible nightmares. Appellant stated that on November 9, 2003 she realized that she should not be at work until she could get a handle on her anxiety, stress, tension and tears, and that, although she thought the symptoms would just go away and she would get some sleep, it did not happen. She noted seeing a clinical psychologist, David Harvey, PhD., on November 10, 2003. Appellant described her condition since the time of the incident as stressed, agitated, tired, constantly breathing fast and shallow, no concentration, depressed, out of control and likely to cry at the drop of a hat.

By decision dated January 8, 2004, the Office rejected appellant's claim finding that she had not submitted any medical evidence to establish that she developed an emotional condition due to the operational error at work on November 6, 2003. The Office noted that it accepted that the claimed employment incident occurred as alleged.

In a letter dated March 11, 2004, appellant requested reconsideration of the January 8, 2004 decision. She complained that her doctor had not been paid.

Nothing further was submitted.

By decision dated March 22, 2004, the Office declined to reopen appellant's case for further review on its merits under 5 U.S.C. § 8128(a). The Office found that appellant had not presented any evidence which would require a merit review.

LEGAL PRECEDENT -- ISSUE 1

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.¹ There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the concept of workers' compensation. These injuries occur in the course of employment and have some kind of causal connection with it but are not covered because they do not arise out of the employment. Distinctions exist as to the type of situations giving rise to an emotional condition which will be covered under the Federal Employees' Compensation Act. Generally speaking, when an employee experiences an emotional reaction to his or her regular or specially assigned employment duties or to a requirement imposed by his or her employment, or has fear or anxiety regarding his or her ability to carry out assigned duties, and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is regarded as due to an injury arising out of and in the course of the employment and comes within the coverage of the Act.² Conversely, if the employee's emotional reaction stems from employment matters which are not related to his or her regular or assigned work duties, the disability is not regarded as having arisen out of and in the course of employment, and does not come within the coverage of the Act.³

In cases involving emotional conditions, the Board has held that when working conditions are alleged as factors in causing disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship, and which working conditions are not deemed to be factors of employment and may not be considered.⁴ If a claimant does implicate a compensable factor of employment, the Office

¹ See *Allen C. Godfrey*, 37 ECAB 3343 (1986); see also *Tarrance D. Davis*, (Docket No. 02-2235, issued June 26, 2003) (regarding a single incident causing an emotional condition, for which a traumatic injury claim was filed).

² *Id.*; see also *Lillian Cutler*, 28 ECAB 125 (1976).

³ *Id.*

⁴ See *Barbara Bush*, 38 ECAB 710 (1987).

should then determine whether the evidence of record substantiates that factor.⁵ When the matter asserted is a compensable factor of employment, and the evidence of record establishes the truth of the matter asserted, then the Office must base its decision on an analysis of the rationalized medical evidence of record.⁶

In assessing the weight of the medical evidence of record, rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. Such an opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.⁷

The opinion of a physician who has specialized training in a particular field of medicine has greater probative value on issues involving that particular field than opinions of other physicians.⁸ The weight of psychiatric medical opinion evidence is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the opinion.⁹

While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty, neither can such opinion be speculative or equivocal. The opinion must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment, and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate factual and medical background.¹⁰ A medical opinion which is equivocal in nature or lacking in adequate medical rationale is of limited probative value and is insufficient to establish an employee's claim.¹¹ Where a physician states that an employment exposure was the "most likely source" of a condition, noted his or her "best clinical guess," and opines that the source of a condition cannot be proven "for certain," such evidence is speculative and equivocal and insufficient to discharge an employee's burden of proof.¹²

⁵ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

⁶ See *Gregory J. Meisenberg*, 44 ECAB 527 (1993).

⁷ *Id.*

⁸ *Effie Davenport (James O. Davenport)*, 8 ECAB 136 (1955).

⁹ *Anna C. Leanza*, 48 ECAB 115 (1996).

¹⁰ See *Samuel Senkow*, 50 ECAB 370 (1999); *Thomas A. Faber*, 50 ECAB 566 (1999); *Judith J. Montage*, 48 ECAB 292 (1997).

¹¹ *Betty M. Regan*, 49 ECAB 496 (1998)

¹² *Wendell D. Harrell*, 49 ECAB 289 (1998).

To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying that an employment incident or factor occurred as alleged; (2) medical evidence establishing that she has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factor caused or aggravated her emotional condition.¹³

ANALYSIS -- ISSUE 1

In this case, appellant alleged that an operational error, for which she was responsible, triggered her feelings of panic and stress, and led to her inability to perform her regular duties. Appellant claimed that she kept seeing the descending aircraft collide with another over and over again. The Board finds that the operational error arose in the performance of appellant's regular duties under *Cutler* and constitutes a compensable employment factor. Therefore the medical evidence of record must be evaluated to determine whether appellant's incapacitating emotional reaction was causally related to the accepted operational error.¹⁴

The Board finds that appellant failed to submit any medical evidence identifying or supporting that she had an emotional condition or discussing the causal relationship of such a condition with the November 6, 2003 operational incident. Appellant was seen and treated by Dr. Harvey, a clinical psychologist, on November 10, 2003, but no medical records or reports were submitted to the record to document such a visit or treatment.

As appellant failed to submit any medical evidence to establish that she had an emotional condition, or that she was treated for an emotional condition, causally related to this November 6, 2003 operational incident, she did not meet her burden of proof to establish her emotional condition claim.

LEGAL PRECEDENT -- ISSUE 2

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office. Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim. Evidence or argument that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹⁵ Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹⁶

¹³ See *Donna Faye Cardwell*, 41 ECAB 730 (1990).

¹⁴ See *Richard J. Dube*, 42 ECAB 916 (1991).

¹⁵ *Helen E. Paglinawan*, 51 ECAB 591 (2000).

¹⁶ *Kevin M. Fatzer*, 51 ECAB 407 (2000).

ANALYSIS -- ISSUE 2

In support of her March 11, 2004 request for reconsideration of the January 8, 2004 decision of the Office, appellant submitted a personal letter identifying her file number and claimed that, in addition to the Form CA-1 she submitted, she filled out a Form CA-2 and a Form CA-16, and submitted the forms to her union representative. Appellant claimed that she was under doctor's orders not to return to the workplace, and stated that she was having nightmares and was not getting much sleep.

Appellant also claimed that her physician had not been paid, and she request that the 118 hours of continuation of pay used while she was out for treatment be restored. She did not, however, submit any medical report or record from Dr. Harvey to document his treatment of her for any emotional condition. No other medical forms, records or reports of any kind, discussing psychiatric treatment or any other kind of intervention, were submitted either.

Appellant, therefore, did not submit any evidence as required by 20 C.F.R. § 10.606(b), that showed the Office erroneously applying a point of law, that advanced a relevant legal argument not previously considered by the Office, or that contained relevant and pertinent evidence not previously considered by the Office, which would require the Office to reopen her case for further consideration of the merits.

Therefore, in accordance with 20 C.F.R. § 10.608(b), when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim. The Office, therefore, properly complied with the provisions of 20 C.F.R. § 10.608(b) and denied a reopening of appellant's record for further review on its merits.

CONCLUSION

The Office properly rejected appellant's emotional condition claim on the basis that no medical evidence was submitted which related causation to the accepted operational error at work. Further, the Office did not abuse its discretion by refusing to reopen appellant's case for further review on its merits, properly citing 20 C.F.R. § 10.608(b).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 22 and January 8, 2004 are hereby affirmed.

Issued: October 19, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member